Supreme Court, U.S.
FILED

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No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Louis J. Gaev,
Petitioner,

v.

United States of America,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was a limiting instruction by the trial Court sufficient to cure the danger of substantial prejudice to defendant where defendant foreswore not to attack the credibility of a co-conspirator witness based upon his entry into a guilty plea or plea agreement, and the government in its case in chief nonetheless introduced the terms and conditions of said plea or agreement?

2. Was the Confrontation Clause of the Sixth Amendment violated when the Court admitted the hearsay statements of an alleged unindicted co-conspirator where there was no independent evidence of this individual's involvement in the conspiracy alleged to involve defendant?

3. Whether defendant should be granted a new trial because of unfair prejudice where the trial Court admitted testimony of a dissimilar and unrelated price fixing conspiracy that did not involve the defendant, and where the Court failed to articulate a balancing as required under Fed. R. Evid. 403?

4. Whether defendant's Fifth Amendment rights were violated where the government in its summation made an indirect allusion to defendant's failure to testify at trial, and where the trial Court issued a non-immediate and merely general limiting instruction to the jury?

5. Whether the trial Court's failure to grant defendant's Motion for a Bill of Particulars, which denied him an opportunity to adequately prepare for trial and which resulted in unfair surprise, caused such severe prejudice to defendant that he should be granted a new trial?

PARTIES TO THE PROCEEDING BELOW

Petitioner in the proceeding below was Louis J. Gaev.

Respondent is the United States of America.

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

LOUIS J. GAEV,

Petitioner,

-versus-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The unreported opinion of the Third Circuit in United States v. Gaev is appended hereto [Appendix A]. The Judgment of Conviction entered by the trial Court, the United States District Court for the District of Pennsylvania, is attached. [Appendix D].[1] The Third

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[1] Where the trial Court orally denied petitioner's motions for mistrial and overruled his objections, the applicable sections of the Joint Appendix ["JA"] submitted to the Third Circuit, not attached,

Circuit's Orders in lieu of a formal mandate and denial of appellant Gaev's Petition for Rehearing with Suggestion for Rehearing In Banc are appended as Appendix B and Appendix C, respectively.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The Court of Appeals exercised jurisdiction pursuant to 28 U.S.C. § 1291. The United States District Court for the Eastern District of Pennsylvania originally had subject matter jurisdiction in that the indictment against Gaev alleged a violation of Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1.

CONSTITUTIONAL PROVISIONS INVOLVED

This matter implicates the Fifth Amendment of the United States Constitution, which provides in relevant part as follows:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . .

This matter implicates the confrontation clause of the Sixth Amendment to the United States Constitution, which provides in relevant part as follows:

> In all criminal prosecution, the accused shall . . . be confronted with the witnesses against him, . . .

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are referenced in the text of this Petition.

STATUTES INVOLVED

Section 1 of The Sherman Anti-Trust act, 15 U.S.C. §1, the entire text of which is set forth in Appendix F.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On August 12, 1992 an indictment was returned against petitioner Louis J. Gaev ("Gaev") alleging that he, as Director of Sales for the Russell-Stanley Corp. ("Russell-Stanley"), a manufacturer of 55-gallon steel drums, conspired with other companies and their representatives between April of 1986 and March of 1990 to fix prices.

Gaev was arraigned on August 27, 1992. A trial date was set for October 19, 1992. The government advised that the corporate co-conspirators were Russell-Stanley, VanLeer Container, Inc. ("VanLeer"), MidAtlantic Container Corporation ("MidAtlantic"), and Eastern Steel Barrel Corporation, and that they would make available to defense counsel the materials under Federal Rules of Criminal Procedure 16, which were estimated to be in excess of 316 linear feet of corporate documents.

On September 2, 1992, Gaev filed motions for a continuance and various discovery motions that included a Bill of Particulars under Federal Rules of Criminal Procedure 7(F). The trial was continued to November

17, 1992.

The Court did not address the pending motion for a Bill of Particulars. Gaev thereafter filed additional motions seeking a further continuance, pursuant to 18 U.S.C. § 3161 and a second Bill of Particulars. The Court granted a continuance of the trial until January 25, 1993, upon which date the trial did actually commence.

After the jury was selected on January 26, 1993, with openings scheduled for the next day, Gaev's counsel was furnished with approximately 1500 pages of Jencks material, 18 U.S.C. § 3500. On January 27, 1993, counsel appeared in Court for the commencement of trial and was presented with 12 full transfile boxes of documents that had been required to be produced in advance of trial pursuant to Federal Rules of Criminal Procedure 12. Gaev's counsel pointed out that he had previously requested a Bill of Particulars and the Federal Rules of Criminal Procedure 12 materials. The Jencks material was anticipated to have been received one week prior to trial. Gaev's counsel asked for additional time to review this material, and the trial Court gave defense counsel only the balance of the remainder of the day to review and digest this vast amount of data.

Jury deliberation commenced on February 17, 1993, and a verdict of guilty was rendered against Gaev on February 19, 1993.

Gaev filed a motion for new trial pursuant to Federal Rules of Criminal Procedure 33, on the grounds

that are incorporated in this petition. [JA Vol. I at 72-73]. The trial Court on May 3, 1993 denied Gaev's motion for a new trial. [JA Vol. I at 74-89]. Defendant was sentenced by the Court on June 30, 1993 to a term of 15 months, a supervised period of release for three years and a $50,000.00 fine. The trial Court granted Gaev's application for a stay of the execution of sentence and bail pending the disposition of his appeal to the Third Circuit Court of Appeals.

Gaev filed a timely appeal of the Judgement of Conviction below with the Third Circuit. On April 29, 1993, the Third Circuit in an unreported decision denied Gaev's appeal. A Petition for Rehearing with Suggestion for Rehearing In Banc was timely filed thereafter. The Third Circuit, pending the disposition of this Petition, granted a further stay of the execution of Gaev's sentence and bail upon application by Gaev's counsel. On May 26, 1994, the Third Circuit by Order denied Gaev's Petition for Rehearing. Gaev surrendered himself to Federal Marshals on August 1, 1994. He is presently incarcerated in a federal correctional center in West Virginia. Gaev seeks review by this Court via Petition for Writ of Certiorari of the Judgment of Conviction entered against him.

B. MATERIAL FACTS

Petitioner Gaev seeks review of his conviction for conspiracy to fix prices in violation of the Sherman Anti-Trust Act.

At his trial, the government contended that there was a four-year price fixing conspiracy in the Eastern

Region of the United States among four corporations, Russell-Stanley, VanLeer, MidAtlantic and Eastern Steel Barrel Corporation.

The government, in its opening, stated that Gaev and his co-conspirators fixed prices for the sale of steel drums by talking and agreeing on prices and price agreements that were to be charged to customers. This allegedly was done by a pattern of telephone calls and meetings among the co-conspirators. [JA Vol. I at 152-153]. It was alleged, but never proven, that the co-conspirators agreed on what prices to charge particular customers, what the increases would be, and that there would not be any undercutting of prices.

Gaev's position at trial was that both he and his employer always aggressively competed for customers, and engaged in permissible price verification only. [JA Vol. I at 172]. It was not disputed that there were a limited number of meetings during the four year period. The purpose of these meetings, as it related Gaev, was for the exchange of historical price information and verification only. It was and is disputed by Gaev, that there was any agreement by him to fix prices or restrain trade or commerce. [JA Vol. I at 180-181].

At Gaev's trial, the government's primary witnesses were Victor Bergwall ("Bergwall"), General Manager of VanLeer, William McEntee ("McEntee"), President of MidAtlantic, and Herbert Stickles ("Stickles"), Executive Vice President of MidAtlantic. Bergwall, McEntee and Stickles were alleged to be co-conspirators with Gaev.

It was not demonstrated or proved at trial that Russell-Stanley's transactional activity was consistent with any anti-competitive scheme. Gaev's economic expert, a well qualified anti-trust economist, concluded that the evidence was not consistent with the assertion that Gaev engaged in an active agreement to fix prices or engaged in price collusion. [JA Vol. IV at 1265-1268]

REASONS FOR GRANTING THE PETITION

Gaev raises five separate issues for review, each of which are important, compelling and recurrent in the context of criminal trials. While it is asserted that each of these issues is worthy of review, in the aggregate the combination of errors at the trial level resulted in staggering prejudice to Gaev's defense such that a review of his conviction must be granted in the interest of justice.

Lower Courts have not uniformly decided the issues raised by Gaev, which address fundamental constitutional protections traditionally afforded to criminal defendants.

While Gaev's petition raises issues with implications that reach far beyond this individual case, his case alone warrants review. Gaev asserts that plea agreements of his alleged co-conspirators were admitted in error when he foreswore not to attack the credibility of these co-conspirators on the basis of their pleas. Gaev's Sixth Amendment Confrontation Clause rights were violated when hearsay statements of an unindicted

co-conspirator were admitted without any independent evidence of this declarant's involvement in the conspiracy at issue. Highly prejudicially evidence of an unrelated conspiracy was improperly admitted into evidence. Gaev's Fifth Amendment rights were violated when the government in summation improperly alluded indirectly to his failure to testify at trial. Finally, the Court's denial of his motion for a Bill of Particulars denied Gaev an adequate opportunity to prepare for trial and resulted in unfair surprise.

LEGAL ARGUMENT

POINT I

WHERE DEFENDANT FORESWORE NOT TO ATTACK THE CREDIBILITY OF A CO-CONSPIRATOR WITNESS BASED UPON HIS ENTRY INTO A GUILTY PLEA OR PLEA AGREEMENT, AND THE GOVERNMENT IN ITS CASE IN CHIEF NONETHELESS INTRODUCED THE TERMS AND CONDITIONS OF SAID PLEA OR AGREEMENT, NO LIMITING INSTRUCTION BY THE COURT WAS SUFFICIENT TO CURE THE DANGER OF SUBSTANTIAL PREJUDICE TO DEFENDANT.

The introduction into evidence at Gaev's trial of the terms and conditions of the plea agreement of a co-conspirator witness in the government's case in chief presents a unique situation that requires this Court to scrutinize more closely the purported remedial effects of limiting instructions to a jury under the circumstances of this case.

Because conspiracy by definition requires the participation of another, the damning effect of the introduction of the terms and conditions of a plea agreement concerning a co-conspirator involved in the same transaction alleged against the defendant cannot adequately by cured by any limiting instruction. Jurors cannot miss the inference that it "takes two to tango", and the real danger of "guilt by association" present in the dynamics of a conspiracy trial mandates that this Court take a closer look at the issue raised by petitioner. This issue is important, recurrent in conspiracy trials and has not been decided uniformly by lower Courts.

Gaev does not assert that the introduction into evidence of the plea agreements of co-conspirators should never be admitted under a limiting instruction in the case in chief against a defendant charged with conspiracy. Rather, Gaev states that because of the uniquely damning and inflammatory nature of evidence of the existence of a co-conspirator's guilty plea involving the same agreement alleged against a defendant, where a defendant foreswears not to attack the credibility of such a co-conspirator witness based upon his guilty plea then this evidence should not be admitted. Evidence of another person's guilty plea concerning similar or identical charges has only slight probative value on the question of a defendant's guilt, but is extremely prejudicial. See, e.g. U.S. v. Werme, 939 F. 2d. 108 (3d Cir. 1991).

At his trial, Gaev moved prior to testimony to exclude from evidence admission of the guilty pleas or plea agreements of the co-conspirator witnesses who ultimately testified against him. Gaev's counsel

foreswore not to attack the credibility of any co-conspirator witness on the basis of any prior criminal record or plea agreement. In its proffer to admit evidence of the existence of and terms and conditions of the guilty pleas or plea agreements of the co-conspirator witnesses, the government articulated its purpose for this damaging and inadmissible evidence by stating: "the purpose is for the jury to assess the credibility, whether it make it less credible or more credible, which could be the case." [JA Vol. I at 243].

Defense counsel pointed out that the prosecution was trying to establish the improper inference that if someone else is guilty then the defendant is guilty. [JA Vol. I at 244]. Defense counsel objected to the trial Court that no limiting instruction would be sufficient to obviate the real prejudice to Gaev. Nonetheless, the trial Court utilized the ineffectual limiting instruction drafted by the government.[2]

Over objection, the government elicited testimony from co-conspirator Bergwall that he plead guilty to a one count violation of the Sherman Act involving individuals including Gaev and including companies including Gaev's employer, Russell-Stanley. The details of Bergwall's plea agreement were admitted before the jury, which were that he was at that time incarcerated

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[2] "I caution you that although you may consider this evidence in assessing credibility and testimony of the witness, giving it such weight as you feel it deserve, you may not consider this evidence against the defendant on trial nor may any inference be drawn against him by reason of this witness' plea. [JA Vol. I at 251]

and fined $35,000.00. [JA Vol. I at 249-251]. The jury then knew that the first of three primary witnesses plead guilty to a criminal conspiracy with Gaev and was incarcerated at the time of his testimony.

Co-conspirator McEntee, also over objection, testified that he entered into a plea agreement for price fixing with Gaev and Russell-Stanley, among others and that he received a five-year probationary term and was fined $100,000.00. [JA Vol. III at 637-639].

Perhaps most egregiously, an unindicted co-conspirator, Stickles, testified over objection that he was testifying pursuant to an immunity order which he understood meant that his testimony could not be used against him unless he perjured himself. [JA Vol. III at 801]. The implication before the jury in that testimony was that Stickles' grant of immunity made him "honest". The government's purpose for introducing testimony regarding the immunity and plea agreements of all the co-conspirators was for the inappropriate purpose of supporting these witnesses' credibility.

In support of its proffer, the government also stated that the introduction of the plea agreements and their terms was necessary to establish before the jury that Gaev was not singled out for punishment. Whatever need the government had in disabusing the jury of the notion that Gaev was selectively prosecuted was and is outweighed by the constitutional mandate that Gaev be entitled to a fair trial. The Court could have instructed the jury that they need concern themselves only with the guilt or innocence of the defendant, and that the involvement of any other person

in any alleged scheme was not the jury's concern. See, e.g. U.S. v. Thomas, 998 F. 2d. 1202 (3d Cir. 1993). U.S. v. Thomas, supra, where a defendant's conviction was reversed, is indistinguishable from the instant matter.

A defendant has the right to have his guilt or innocence determined by the evidence presented against him, not by what has happened regarding the criminal prosecution against someone else. U.S. v. Toner, 173 F. 2d. 140, 142 (3d Cir. 1949). Substantial prejudice to a defendant's rights can occur where evidence of a co-conspirator's guilty plea is admitted. See, e.g. U.S. v. Tyler, 878 F. 2d. 753 (3d Cir. 1989).

Since the trial Court never articulated a balancing as required under Fed. R. Evid. 403, appellate review of the Court's reasoning is impossible. For this reason alone, defendant is entitled to a new trial. Clearly, the introduction of the guilty pleas and plea agreements of the co-conspirator witnesses was not harmless. The introduction of these agreements had a devastating effect on Gaev's defense, and constituted the government's strongest evidence presented against him. Courts have long recognized the substantial prejudice to a defendant's rights that can occur where evidence of a co-conspirator's guilty plea is admitted. See, e.g. U.S. v. Tyler, 878 F. 2d. 753 (3d Cir. 1989).

Since the "credibility" of a witness is always at issue, the holdings by the lower Courts in this case create a standard whereby the plea agreements of co-conspirators would be admissible in all cases so long as a limiting instruction is given by a trial Court, even

where a defendant has foresworn prior to the government's case in chief not to attack the credibility of these witnesses based upon their entry into guilty pleas or plea agreements.

In its case against Gaev, the government enjoyed the fruits of the presumption at law that juries uniformly obey limiting instructions, while cynically and with purpose utilized the plea agreements of the co-conspirator witnesses as indirect evidence of Gaev's guilt. The government's thinly veiled strategy was revealed in its summation. [3]

The defendant is entitled to a new trial because this highly prejudicial testimony denied him a fair trial. Moreover, based on the paucity of the direct incriminating evidence of any absolute price fixing agreement against Mr. Gaev, there is a substantial probability that this testimony "could have and had a substantial influence on the jury's decision", thereby mandating a new trial. See, U.S. v. Clark, 617 F.Supp. 693, 694 (E.D.Pa. 1985) aff'd. 791 F.2d. 922 (3d Cir. 1986).

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[3] The prosecutor stopped just short of stating that Mr. Gaev must be guilty because the witnesses were required to testify as to the truth: "All three of these people told you that they clearly understood that they had no protection whatsoever if they lied. In fact they all clearly understood that they could be prosecuted for perjury if they lied during this trial." [JA Vol. VI at 1577].

POINT II

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WAS VIOLATED WHEN THE COURT IMPROPERLY ADMITTED HEARSAY STATEMENTS OF AN ALLEGED UNINDICTED CO-CONSPIRATOR WHERE THERE WAS NO INDEPENDENT EVIDENCE OF THIS INDIVIDUAL'S INVOLVEMENT IN THE CONSPIRACY ALLEGED TO INVOLVE DEFENDANT.

Despite the complete absence of proof aliunde, the trial Court improperly admitted into evidence hearsay statements made by an alleged co-conspirator. These statements severely prejudiced Gaev's defense by substantially influencing the jury's decision and by violating his Sixth Amendment rights under the Confrontation Clause. The alleged co-conspirator in question, Daniel Milikowsky, was not a witness at the trial of Gaev and was not subject to cross-examination. Milikowsky was contended by the government to be an unindicted co-conspirator. [JA Vol. I at 28-32].

The prosecution offered nothing other than the hearsay statements of co-conspirators Stickles and McEntee in support of their proffer to admit the hearsay statements of Milikowsky. The government attempted to elicit testimony from McEntee about how the non-witness and alleged co-conspirator Milikowsky played a part in the periodic price increase announcements that the government alleged to be the product of the conspiracy involving Gaev. Immediately, Gaev's counsel interposed an objection anticipating

inappropriate hearsay. [JA Vol. III at 660-662]. The trial Court observed that there was nothing in the trial record that established any independent evidence of Mr. Milikowsky's involvement in the price-fixing scheme involving his company (MidAtlantic) and the others. The trial Court then gave the prosecution a brief period of time during a recess in the trial to find the independent evidence that was needed in addition to the hearsay statements. [JA Vol. III at 669-672]. The prosecution had merely referenced hearsay statements made Mr. Milikowsky to Mr. McEntee and to Mr. Stickles, without setting forth any independent evidence of Milikowsky's involvement in the conspiracy. [JA Vol. III at 675-681].

The trial Court, without any factual basis or statement of reasons, had a change of position and permitted the prosecution to introduce this inappropriate testimony. [JA Vol. III at 683].

This inadmissible hearsay was compounded because co-conspirator McEntee testified that Milikowsky spoke with a Mr. Lima, the President of Russell-Stanley, and a Mr. DeBerry, a Vice President of VanLeer, regarding when the three companies would put into effect alleged price increases. [JA Vol. III at 688-691]. Counsel for Gaev continued to object. What was now being testified to were discussions between Milikowsky, Lima and DeBerry about general price increase announcements. None of these three conversants were witnesses at the trial.

Fed. R. Evid. 801(d)(2)(E) provides that a statement is not hearsay if made by co-conspirator of a

party during the course of and in furtherance of the conspiracy. In order to be admissible under Federal Rule of Evidence 801(d)(2)(E), there must be evidence of a conspiracy involving the declarant and the defendant and evidence that the statement was made "during the course of and in furtherance of the conspiracy." Bourjaily v. U.S., 483 U.S. 171 (1987).

Both the conspiracy and the declarant's involvement therein must be established by a preponderance of the evidence. Bourjaily, 483 U.S. at 184. (Stevens, J., concurring). It is generally agreed that an otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility. Bourjaily, 483 U.S. at 184 (Stevens, J., concurring). Indeed, the hearsay statements of co-conspirators are presumed unreliable. Id.; 483 U.S. at 179. Independent corroborating evidence is necessary to rebut this inherent unreliability. Id.; 4 J. Weinstein & M. Berger, Weinstein's Evidence, Para. 801(d)(2)(E) [01] at 801-852 (1991).

Because the only evidence of Milikowsky's involvement offered by the government was the hearsay statements themselves, this testimony remained inherently unreliable and should not have been admitted into evidence. More compelling, because the statements are not co-conspirators' statements as defined under Fed. R. Evid. 801(d)(2)(E), admitting them violated Gaev's Sixth Amendment right of confrontation.

The Sixth Amendment guarantees that "the accused shall have the right . . . to be confronted with the witnesses against him." Ohio v. Roberts, 448 U.S.

56, 62-63 (1980). The underlying purpose is that the defendant be given the opportunity to cross-examine the witnesses against him. Bruton v. U.S., 391 U.S. 123, 127 (1968).

Gaev was denied the opportunity to cross-examine Milikowsky to ascertain the truth of the aforementioned statements, in violation of his Sixth Amendment rights. Therefore, a new trial should be ordered.

The circumstances constituting Gaev's petition to the Court are not unique and will certainly recur with great frequency in other conspiracy cases. Lower Courts are in need of guidance on the important issue of whether hearsay statements alone can constitute the independent evidence of the declarant's involvement required to admit the statements of an alleged co-conspirator under Fed. R. Evid. 801(d)(2)(E).

POINT III

WHERE THE ADMISSION OF TESTIMONY OF A DISSIMILAR AND UNRELATED PRICE FIXING CONSPIRACY THAT DID NOT INVOLVE THE DEFENDANT CREATED UNFAIR PREJUDICE, AND WHERE THE COURT FAILED TO ARTICULATE A BALANCING AS REQUIRED UNDER FED. R. EVID. 403, DEFENDANT SHOULD BE GRANTED A NEW TRIAL.

The indictment against Gaev alleges a price fixing conspiracy in the new steel drum industry in the "Eastern Region" of the United States.

During cross-examination of Gaev's expert witness, and under the pretext of impeaching this expert's credibility, the government brought before the jury evidence of an unrelated price fixing conspiracy in the steel drum industry in the Central Region of the United States. This unrelated price fixing conspiracy did not involve defendant Gaev or his employer, Russell-Stanley Corporation. The government acknowledged that in this unrelated conspiracy, the only overlapping co-conspirator was the VanLeer Corporation. [JA Vol. V at 1466].

Because of the highly sensitive and prejudicial nature of this evidence of an unrelated conspiracy, the Court granted Gaev's counsel's request that the government make a proffer out of the presence of the jury. [JA Vol. V at 1463-1471].

Defense counsel argued that there could be an improper transference of guilt created if some individual was convicted in an unrelated price fixing conspiracy in the same industry as Gaev in another part of the country. It was obvious that the government's intended inference was that criminal price fixing permeated the steel drum industry.

Over objection, the government was permitted by the trial court to ask defendant's expert if he was familiar with a price fixing conspiracy in the central region of the United States. The government then asked this expert if it had come to his attention that seven companies active in the central region of the United States had plead guilty to price fixing. Defense counsel objected and subsequently moved for a mistrial. Both

requests by counsel were rejected by the trial Court. The dissimilarity of facts and offenders were seemingly unimportant to the trial Court.

It is impossible for an Appellate Court to review the trial Court's reasoning in the case at bar since the Court articulated no balancing as required under Fed. R. Evid. 403 concerning a weighing of the probable prejudice to the defendant versus the probative value of the admissibility of this evidence to the government's case. Without competent evidence, the propounded questions on cross-examination concerning an inadmissible, unrelated, and dissimilar price fixing conspiracy in the same industry did little to impeach the testimony of Gaev's expert, but was designed and intended to create the inference that Gaev, like everyone in that industry, price fixed.

It is essential that the record reflect the Court's balancing analysis in order to enable a reviewing Court to determine if the Court's decision was arbitrary. U.S. v. Long, 574 F.2d. 761, 767 (3d Cir. 1978), cert. denied, 439 U.S. 985. When properly analyzed, it is clear that the testimony that Gaev challenged had marginal probative value. Gaev's expert testified that the "Eastern" and "Central" markets were completely different. [JA Vol. V at 1528-1529].

Undue prejudice has been defined as having the "tendency to suggest a decision on an improper basis." 1 J. Weinstein & M. Berger, Weinstein's Evidence, Para. 403 [03] at 403-433 (1991). Evidence is unfairly prejudicial if it "may cause a jury to base its decision on something other than the established propositions in the

case." Id., Para. 403 [03] at 403-415 to 403-417 (1978).

It is well established that evidence of a prior conviction creates a strong inference for the jury that the same offense occurred in the matter at trial. See, Coleman Motor Co. v. Chrysler Motors Corp., 525 F.2d. 1338, 1351 (3d Cir. 1975) (A jury is likely to give a prior verdict more weight that it warrants). Thus, testimony concerning the fact that a prior jury found the existence of a price fixing conspiracy in a separate region of the same industry undoubtedly would create a very strong inference that, more likely than not, such a conspiracy occurred in the Eastern region where Gaev operated. This is unfair since it is clear that a defendant has a "right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." U.S. v. Toner, 173 F.2d. 140, 142 (3d Cir. 1949).

Any arguable probative value of the challenged testimony was clearly outweighed by the likely danger that the jury would defer to the convictions in the earlier case in the central region. The subject matter should have been excluded. Defendant is entitled to a new trial because any knowledge of the conspiracy in the central region "could" have influenced the jury, causing undue prejudice to the defendant.

POINT IV

THE INDIRECT ALLUSION BY THE GOVERNMENT IN ITS SUMMATION TO DEFENDANT'S FAILURE TO TESTIFY VIOLATED THE FIFTH AMENDMENT AND WAS NOT CURED BY A GENERAL LIMITING INSTRUCTION BY THE COURT.

In clear violation of the Fifth Amendment and of the rules set forth by this Court in Griffin v. California, 380 U.S. 609 (1965), the government in its summation improperly commented on Gaev's failure to testify.

The government's evidence was that four individuals, the three witness unindicted co-conspirators, Bergwall, McEntee and Stickles, together with the defendant, Gaev, all utilized the alias "Bob Rogers" in lieu of their real names during the alleged conspiratorial telephone calls. [JA Vol. II at 369-370] (Bergwall); [JA Vol. III at 741-743] (McEntee); [JA Vol. III at 860-862] (Stickles).

In the theory and context of the government's case and evidence, "Bob Rogers" was one of four people - Bergwall, McEntee, Stickles and the defendant, Gaev. It was alleged that the fictitious name was used to conceal the true identities of the aforementioned individuals when they placed telephone calls that were purportedly made in furtherance of the conspiracy.

Of these four telephone conversants, three of them testified and one did not. The one who did not testify in the trial was the defendant, Gaev, who had

invoked at trial his constitutionally protected right not to testify under the Fifth Amendment.

With that evidential background, the prosecutor commented in her summation on Gaev's exercise of his Fifth Amendment privilege as set forth below. [4] Defense counsel objected to the inappropriate comment by the government in its summation because of the obvious attempt to create an inference that "Bob Rogers" was in fact Louis Gaev who did not appear in the witness stand. [JA Vol. VI at 1593-1594]. In denying defense counsel's objection to the improper comments, the trial Court held that the comments "did not directly purport to be your client." [JA Vol. VI at 1594].

The trial Court's limited analysis seems to indicate that the prosecutor's comments would not violate Gaev's constitutional rights unless the prosecution specifically stated that the defendant, by name, "Louis Gaev", failed to take the stand. The Court did not address the problem raised by the fact

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[4] "So there is one more activity that we need to talk about. One other thing that belies the notion that all that was going on here was verification of prices. That argument does not take into account Mr. Bergwall, Mr. Stickles and Mr. McEntee. Their testimony is supported by one other participant in the conspiracy. Ladies and gentlemen, that individual didn't appear in this courtroom, but like the other witnesses, he addressed a great deal to the story that has been told here, and he can't be accused of lying or forgetting or making things up to please the government. Who am I talking about? His name is Bob Rogers. Bob Rogers existed for one reason and for one reason only. Because the defendant knew what he was doing was wrong. He knew it was illegal to fix prices with his competitors. [JA Vol. VI at 1588-1589]

that everyone who purportedly was "Bob Rogers" took the stand and testified, with the exception of Gaev.

Indirect allusions to a defendant's failure to testify are prohibited. The operative test is whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. U.S. v. Dansker, 537 F.2d. 40, 63 (3d Cir. 1976), cert den., 429 U.S. 1038. In the instant matter, the jury could not have missed the allusion to Gaev's failure to testify, he having been the only individual alleged during the government's direct case as using the alias "Bob Rogers" not to take the stand.

The trial Court stated that its instruction to the jury concerning Gaev's Fifth Amendment right not to testify was sufficient to cure any prejudice caused by the government's improper remark. [JA Vol. VI at 1594]. The Seventh Circuit has held that a trial Court's general instruction at the close of a case about a defendant's right not to testify was insufficient to cure prejudice caused by a prosecutor's remarks concerning the defendant's failure to take the stand. U.S. v. Handman, 447 F.2d. 853 (7th Cir. 1971).

The violation of Gaev's Fifth Amendment right by the government through its comments in summation was not harmless beyond a reasonable doubt, and therefore this petitioner is entitled to a new trial. The government cannot say indirectly what it would otherwise be forbidden to say directly under the Fifth Amendment, where, as here, the defendant is easily identified by the comment in question and his failure to

testify is noted.

The logic of the trial Court does not hold up under constitutional analysis, where every juror could not help but catch the thinly veiled reference to Gaev's failure to testify. The prejudice created by the government's comments was devastating, and a general limiting instruction by the Court, not specifically tailored to the prosecutor's comments, denied Gaev a fair trial. Indeed, it could be cogently argued that the comment in question so violated Gaev's Fifth Amendment rights that no limiting instruction would have been sufficient to alleviate the extreme prejudice it created.

POINT V

THE TRIAL COURT'S FAILURE TO GRANT DEFENDANT'S MOTION FOR A BILL OF PARTICULARS DENIED HIM AN OPPORTUNITY TO ADEQUATELY PREPARE FOR TRIAL AND AVOID UNFAIR SURPRISE, CAUSING SUCH SEVERE PREJUDICE AS TO MANDATE A NEW TRIAL.

The indictment against Gaev alleged that he conspired to fix prices for approximately four years throughout the eastern region of the United States. The defense filed pretrial motions on two occasions seeking Bills of Particulars pursuant to Federal Rules of Criminal Procedure 7(F). [JA Vol. I at 23-26; 33-36]. The motions sought particulars of allegedly illicit acts on

the part of Gaev, the identity of victims, and other relevant specifics.

The government issued a voluntarily Bill of Particulars solely limited to the identification of alleged unindicted corporate and individual co-conspirators. [JA Vol. I at 28-32]. This was for the purpose of attempting to provide a foundation for the admission of co-conspirator hearsay, rather than to provide a particularization of information that would facilitate Gaev's ability to prepare and respond to the charges raised against him. The trial Court issued an Order that required the government to only state whether the allegations against Gaev involved "collusion in bidding." The Court did not require the government to identify any specific customer, victim, transaction, event or incident attributable to the defendant Gaev. [JA Vol. I at 64-69].

The government advised that there would be full access by Gaev to discovery documents that measured in excess of 316 linear feet of shelving space. [JA Vol. I at 20-22]. The Court ordered one continuance of insufficient duration to allow Gaev to prepare for trial, and the trial subsequently commenced as "specially listed" on January 25, 1993. [JA Vol. I at 63].

In an effort to properly review and understand the details of the very broad and complex charges contained in the indictment, Gaev engaged the services of an economist and an economic consulting firm. Several individuals went to the Justice Department offices and undertook the laborious task of reviewing 300 linear feet of documents. 30,000 documents were

selected by Gaev for further analysis and review. [JA Vol. IV at 1261-1262]. Computer tapes that were obtained from VanLeer had to be deciphered. [JA Vol. IV at 1263-1264]. Similar computer information was obtained directly from the Russell-Stanley Corporation, which data referred to product and transaction information from 1986 through 1990. [JA Vol. IV at 1264].

In this case, the indictment did not permit the defense to "avoid surprise during trial." The length of the alleged conspiracy, coupled with the sheer volume of Russell-Stanley customers, made it impossible for Gaev to adequately prepare for trial. Moreover, the indictment did not identify specific victims of the alleged conspiracy. Nonetheless, unbeknownst to the defense, the government was concentrating on Gaev's dealings with only a select few Russell-Stanley customers. Indeed, the government's knowledge was extensively utilized to its advantage at trial and during summation. The significance of this lack of information was further crystallized during summations, when the government repeatedly attacked the credibility of the defense's expert because the expert's evaluation was based on all of the Russell-Stanley customers. [JA Vol. VI at 1708].

Based upon the indictment, the defendant was compelled to justify his dealings with every Russell-Stanley customer. See, U.S. v. Smith, 16 F.R.D. 372, 375 (W.D. Mo. 1954). (Being presumed innocent, it must be assumed "that [defendant] is ignorant of the facts on which the pleader found his charges"). In effect, the government's refusal to identify the specific companies allegedly victimized by the defendant compelled him to

defend his pricing practices with over 200 customers. The alleged conspiracy took place over four years and spanned 12 States. This approach was expressly condemned by the Second Circuit in U.S. v. Bortnovsky, 820 F.2d. 572, 575 (2d Cir. 1987).

The government, for strategic reasons, chose not to allege in the indictment returned against Gaev specific transactions deemed violative of the Sherman Act, and focused instead on his alleged agreement to conspire. Therefore, in its indictment, the government did not have to list the specific transactions that were alleged to have been violated by Gaev as requested through his Bill of Particulars. While the government did not have to introduce evidence of specific transactions to convict Gaev of conspiracy to violate the Sherman Act, it nevertheless chose to introduce evidence of specific transactions or events of conspiracy without notice or warning to defendant, while at the same time successfully blocked Gaev's efforts to obtain "particularization" of the allegations against him. As a result of the unfair surprise created by the government's tactics, Gaev's expert was forced to give regrettably superficial testimony because he was unable to prepare sufficiently for all the items contained in the 316 linear feet of discovery that Gaev concededly had "access" to.

Admittedly, a Bill of Particulars is not a discovery tool. U.S. v. Smith, 776 F.2d. 1104, 1111 (3d Cir. 1985). However, it should inform the defendant of the nature of the charges against him so that he can adequately prepare for trial to avoid surprise during trial and to protect him from a second prosecution. Wang Tai v. U.S., 273 U.S. 77, 82 (1927).

Gaev was denied a fair trial because of the prejudice and unfair surprise that resulted from the lack of particularization by the government concerning the production of documents. Without knowledge of specific allegations of price fixing, the 300 linear feet of documents, coupled with the brief four-month period in which Gaev had to prepare for trial, unfairly shifted the burden of proof from the government to Gaev concerning his guilt.

The Herculean and daunting task that Gaev faced is particularly offensive in light of the fact that the government, as evidenced at trial, knew of the select few customers that it was alleging were victimized by the defendant's conduct. The government also exploited its superior knowledge of specific transactions to its fullest and most unfair advantage at trial, even reducing same to a chart which was used to discredit Gaev's expert.

If given adequate time to prepare, Gaev and his expert would have been able to vigorously and cogently defend each of the allegations raised during the cross-examination of Gaev's expert, by successfully establishing that these transactions were consistent with Gaev's defense to the conspiracy that he and his employer engaged in permissible price verification only and in vigorous competition with competitors concerning price. What happened to Gaev at trial was inconceivably unfair, and he should be granted a new trial in the interest of justice.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Dated: August 22, 1994

Respectfully submitted,

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APPENDIX

APPENDIX A

Filed April 29, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1643

UNITED STATES OF AMERICA
v.
LOUIS J. GAEV
Louis Gaev,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 92-00457)

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 19, 1994

Before: SLOVITER, Chief Judge, SCIRICA
and LEWIS, Circuit Judges

(Filed: April 29, 1994)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*

Defendant Louis J. Gaev appeals his conviction for conspiring to fix prices in violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1988). Although Gaev alleges numerous trial errors, we will discuss only one in detail, that the plea agreements of his co-conspirators were improperly admitted into evidence. We will affirm the judgment of conviction and sentence.

I.

On August 12, 1992, Louis J. Gaev was indicted for conspiring to fix prices of new steel drums offered for sale to customers in the eastern United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] The indictment charged that for a period of at least four years, generally from April, 1986 through March, 1990, Gaev, as Director of National Sales for the Russell-

[1] The district court had jurisdiction under 15 U.S.C. § 1 and § 18 U.S.C. § 3231 (1988). We have jurisdiction under 28 U.S.C. § 1291 (1988).

Stanley Corporation, together with co-conspirators, violated the Act by: discussing and agreeing to increase prices on new steel drums to individual customers and to coordinate timing of those price changes; participating in meetings and telephone conversations with co-conspirators to determine prices and terms of sales to individual customers; issuing price quotations in accordance with agreements reached; and concealing conspiratorial contracts through various means, including the use of aliases.

II.

Steel drums are large steel packing containers used to store or transport chemical and petroleum products. They come in different sizes and gauges, with different types of closures, with or without linings, particular finishes and surface designs or logos. A customer orders by designating a code number for a particular set of specifications, which helps suppliers to quote a price. Most customers prefer multiple suppliers over a single supplier to insure an uninterrupted supply, wider choice and more competitive pricing. Most order prices are negotiated, but some are open to competitive bidding.

Russell-Stanley Corporation ("Russell-Stanley"), Van Leer Containers, Inc. ("Van Leer"), and Mid Atlantic Container Corporation ("Mid Atlantic") were the three major suppliers of new 55 gallon steel drums in the eastern region of the United States between 1986 and 1990. During that time, each company announced price increases on steel drums twice a year. The price increases were announced within a few weeks of each

other and all were similar or identical in amount and effective date.

Officers of two of the corporations testified at Gaev's trial that they had participated with him in a price-fixing conspiracy. They were Victor Bergwall, General Manager of Sales for Van Leer, William McEntee, President of Mid Atlantic and Herbert Stickles, Executive Vice President of Mid Atlantic. Their testimony was corroborated by documentary evidence, including phone records, expense reports, price announcements, and handwritten memoranda.

Victor Bergwall testified that he was unhappy with the price-cutting that prevailed in the industry in the mid-1980's. In 1986, Bergwall and Herbert Stickles discussed the volatility of the steel drum market and decided it would be better to compete on a basis of quality and service rather than price. The two men began calling each other to verify whether their mutual customers were telling the truth when they claimed to one of them that the other would give a better price on a particular drum. These conversations soon turned to discussions of future prices. Each time a general price increase was announced, Bergwall and Stickles discussed when to put it into effect and how much of it to implement with specific customers.

Bergwall testified that, early in 1986, he commenced similar discussions with Gaev at Russell-Stanley. Bergwall knew he should not be talking to competitors about pricing, but he wanted to "stabilize the market" and believed that Russell-Stanley, who was the largest suppler, had to be part of the agreement.

Bergwall and Gaev discussed customers and locations to which they supplied the same drums. These included their largest accounts. The purpose of these agreements was to stabilize prices and make a "reasonable margin of profit."

Stickles testified that his discussions with Gaev and Bergwall began after Mid Atlantic's owner, Daniel Milikowsky, told him to call the other two companies for information that his salesmen might need about prices to "be receptive to their calls" as well. After Milikowsky told Stickles that "the channels [of communication] had been opened," Stickles called Gaev and Bergwall on a regular basis to ascertain the prices they quoted to mutual customers. After receiving a competitor's price for a particular drum, Mid Atlantic offered its drum at the same price or a slightly higher price (to avoid buyer suspicion). Stickles passed on similar information to Gaev. When Stickles was unavailable, Mid Atlantic's President, Bill McEntee, exchanged information with the others.

Every time there was a general announcement of a price increase, Bergwall and Stickles talked to Gaev and agreed on the amount and timing of increases for specific customers. When one called another for a price, it was understood that the caller could meet, but not undercut, the other's price. Thus, they understood that they would compete for customers only on the basis of service and quality, not on the basis of price. Price levels "improved" in 1987 after these agreements were in place, and by mid- 1988, Van Leer internal documents reported a "stable market with higher prices."

Bergwall estimated he made hundreds of calls to Gaev and Stickles to discuss their prices, primarily at the time of price increase announcements. He estimated he talked to Gaev and Stickles about 10 times a week normally and 20-30 times a week at the time the semi-annual price increases were announced. He testified Gaev was concerned that frequent calls between competitors might appear suspicious and suggested the conspirators use aliases when calling each other, In response, the others adopted aliases when calling Gaev. In addition to conferring by telephone, Bergwall and Stickles testified they occasionally met separately with Gaev to discuss important accounts, usually at the time of price increases. Mid Atlantic records corroborate that Gaev, Bergwall, Stickles and McEntee exchanged information not only on current prices but on future prices as well. Although Gaev did not testify at his trial, his attorney, in his opening statement, acknowledged there were phone calls and meetings during the four year period; but he claimed the parties only exchanged historical price information and verified current prices and did not set future prices.

At trial, the court allowed the government to introduce evidence of its plea agreements with Bergwall, Stickles and McEntee. When Bergwall's plea agreement was introduced, over counsel's objections, the trial judge gave the following limited instruction:[2]

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[2] The trial judge gave the same instruction with McEntee's plea agreement was introduced and gave a modified version for the plea agreement of Stickles, who was testifying under a grant of immunity.

> [Y]ou have just heard evidence that this witness had pled guilty to a charge of conspiring to fix prices with the defendant now on trial in this case.
>
> I caution you that although you may consider this evidence in assessing the credibility and testimony of this witness, giving it such weight as you feel it deserves, you may not consider this evidence against the defendant on trial, nor may any inference be drawn against him by reason of this witness' plea.

In his final charge to the jury, the judge reiterated and elaborated on that instruction:

> I instruct you, as I previously instructed you after the conclusion of each of their testimony or direct examination, that you are instructed that you are to draw no conclusions of inferences of any kind about the guilt of the defendant on trial from the facts that a prosecution witness pled guilty to similar charges. That witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

The trial judge went on to give extensive and detailed instructions on how the jury should consider the testimony of accomplices and admitted felons who had entered into plea agreements with the government.

III.

The trial court's decision to admit plea agreements of co-conspirators is an evidentiary ruling which we review for abuse of discretion. *Government of the Virgin Islands v. Pinney*, 967 F.2d 912, 914 (3d Cir. 1992); *United States v. Leo*, 941 F.2d 181, 188 (3d Cir. 1991).

It is well established that the plea agreements of co-conspirators cannot be used as evidence of a defendant's guilt. As we stated in *United States v. Gambino*, 926 F.2d 1335 (3rd Cir.), *cert. denied*, 112 S.Ct. 415 (1991):

> There are strong considerations against using co-conspirator's guilt as substantive evidence of another defendant's guilt. "The foundation of [this] policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else . . . The defendant ha[s] a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir.) (quoting *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949)), *cert denied*, 449 U.S. 1042, 101 S.Ct. 622, 66 L.Ed.2d. 504 (1980). In *Biscaccia*, a *habeas corpus* proceeding, we held that a prosecutor's use of a co-conspirator's guilty plea to establish another defendant's guilt was error, and remanded for a determination of whether the error was harmless.

926 F.2d at 1363 (alteration in original); *see also United States v. Werme*, 939 F.2d 108, 113 (3d Cir. 1991) *cert. denied*, 112 S.Ct. 1165 (1992); *United States v. Gullo*, 502 F.2d 759, 761 (3d Cir. 1974).

But "[t]his specter is not implicated when a guilty plea is introduced not to establish a co-conspirator's guilt, but for some valid purpose." *Gambino*, 926 F.2d at 1363. In *Gambino*, we gave examples of guilty pleas that had been introduced for valid purposes. *See, e.g., United States v. Casto*, 889 F.2d 562, 567 (5th Cir. 1989), *cert. denied*, 493 U.S. 1092 (1990); *United States v.Dworken* , 855 F.2d 12 (1st Cir. 1988); *United States v. Louis*, 814 F.2d 852 (2d Cir. 1987). In *United States v. Inadi*, 790 F.2d 383 (3d Cir.), *rev'd on other grounds*, 475 U.S. 387 (1986), we allowed the admission of a co-conspirator's guilty plea "in order to rebut defense counsel's persistent attempts on cross-examination to raise an inference that the co-conspirators had not been prosecuted, and that Inadi was being singled out for prosecution." *Id.* at 384, n.2. We also allowed the government to use co-conspirator's guilty plea to dampen attacks on credibility and foreclose any suggestion it was concealing evidence. *Gambino*, 926 F.2d at 1364. It may also be proper to introduce a witness's guilty plea to explain his firsthand knowledge of the defendant's misdeeds. *United States v. Halbert*, 640 F.2d 1000, 1005 (9th Cir. 1981). "The most frequent purpose for introducing such evidence is to bring to the jury's attention facts bearing upon a witness's credibility." *Werme*, 939 F.2d at 114 (citing *Gambino*, 926 F.2d at 1363).

Underlying these valid uses of the plea agreement of a co-conspirator is a general principle, which may be stated as follows: If a co-conspirator who appears as a witness has pleaded guilty, the trier to fact should know about the plea agreement in order properly to evaluate the witness's testimony, unless that would unduly prejudice the defendant. *See* 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 410[07] (1993) ("Where the co-conspirator. . . testifies to his part in the transaction, it is not error to inform the jury of the plea so long as a proper cautionary instruction is given and there are no aggravating circumstances which necessarily implicate the defendant [] in the pleader's admission of guilt.")(footnotes omitted). When a co-conspirator testifies he took part in the crime with which the defendant is charged, his credibility will automatically be implicated. Questions will arise in the minds of the jurors whether the co-conspirator is being prosecuted, why he is testifying, and what he may be getting in return. If jurors know the terms of the plea agreement, these questions will be set to rest and they will be able to evaluate the declarant's motives and credibility. *See, e.g. United States v. Portac, Inc.* 869 F.2d 1288, 1296 (9th Cir. 1989) (*cert. denied sub nom. Wolf v. U.S.*, 498 U.S. 845 (1990) ("The government was entitled ... to disclose the terms of the plea agreements of ... two companies in order for the jury to assess the credibility of their two officers ... who testified against [the defendant]."); *United States v. Dunn*, 841 F.2d 1026, 1030 (10th Cir. 1988) ("If a [co-conspirator] testifies, the government or defense may question the witness about the plea in order for the jury to assess the credibility of the witness."); *United States v. Ben M. Hogan Co.*, 769

F.2d 1293, 1303 (8th Cir. 1985) (*vacated on other grounds*, 478 U.S. 1016 (1986) (" 'Evidence [elicited by the government on direct examination that co-defendant witness] entered a plea of guilty to the same offense is not error unless it is elicited as substantive proof of the defendant's guilt.'") (quoting *United States v. Wiesle*, 542 F.2d 61, 62 (8th Cir. 1976)); *United States v. Mealy*, 851 F.2d 890, 899 (7th Cir. 1988) ("The well-established rule in this circuit is that, on direct examination, the prosecutor may elicit testimony regarding the witness's plea agreement and actually introduce the plea agreement into evidence."); see also United States v. Casto, 889 F.2d 562, 567 (5th Cir. 1989) (prosecutor can introduce plea agreement of co-defendant witness for purpose other than to establish defendant's guilt);[3] *United States v. Louis*, 814 F.2d 852, 856 (2nd Cir. 1987) ("[I]t is acceptable for the government to elicit, for proper purposes and in a proper manner, an accomplice witness' testimony regarding his conviction."); *United States v. Dworken*, 855 F.2d 12, 30 (st Cir. 1988) (where cautionary instructions limited the jury's use of the guilty plea to permissible purposes, it was not error for government to reveal that co-conspirator had pled

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[3] *Casto* also list several factors that courts consider in evaluating the impact of a witness guilty plea including:

> the presence or absence of a limiting instruction, whether there was a proper purpose in introducing the fact of the guilty plea, whether the plea was improperly emphasized or used as a substantive evidence of guilt, and whether the introduction of the plea was invited by defense counsel.

Casto, 889 F.2d at 567 (quoting *United States v. Black*, 685 F.2d 132, 135 (5th Cir.), *cert. denied*, 459 U.S. 1021 (1982)). In this case, the plea was not properly emphasized or used by the prosecutor.

guilty); *United States v. Countryman*, 758 F.2d 574, 577 (11th Cir. 1985) (government could use guilty plea of co-conspirator witness to blunt impact of expected attacks on witness's credibility); *United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981) (government may offer guilty plea of co-defendant witness for jury to consider in evaluating witness's credibility); *United States v. Warner*, 955 F.2d 441, 455 (6th Cir.) *cert. denied sub nom. Redd v. United States*, 112 S.Ct. 3050 (1992) (guilty plea of co-defendant witness properly admitted to help jury assess her credibility); *United States v. Whitehead*, 618 F.2d 523, 529-30 (4th Cir. 1980), *rev'd on other grounds*, 452 U.S. 576 (1981) (prosecution's limited introduction of guilty pleas of co-defendant witnesses was proper); *United States v. Tyler*, 878 F.2d 753, 761 (3rd Cir.), *cert. denied*, 493 U.S. 899 (1989) (jury instructions can cure possible error caused by introduction of witness's guilty plea); *United States v. Newman*, 490 F.2d 139, 143 (3rd Cir. 1974) (same).

While plea agreements have often been admitted in response to actual or anticipated attacks on a witness's credibility, an attack is not always necessary to justify their introduction. In *Gambino*, the defendants began their attack on the credibility of the government's witnesses in their opening statements to the jury, but we noted that "even in the absence of this attack, the elicited testimony was proper here." *Gambino*, 926 F.2d at 1363.

The trial judge must balance the probative value and prejudicial effects of evidence before deciding whether to admit it. Although the case law shows the

balancing is often implicit rather than explicit, the standard remains that of Federal Rule of Civil Procedure 403.[4] Generally, evidence of a co-conspirator's guilty plea is prejudicial to the defendant on trial absent limiting jury instructions against using the plea as substantive evidence of defendant's guilt. *Werme*, 939 F.2d at 114. As we have stated, "In several cases where evidence of a co-conspirator's guilty plea was entered, we have held that proper limiting instructions from the court cured the possible prejudice to the defendant." *United States v. Thomas*, 998 F.2d 1202, 1206 (3rd Cir. 1993). There also may be cases where the inference of guilty from the co-conspirator's plea agreement is sufficiently strong that even limiting instructions will not effectively contain it. In Thomas, we reviewed the district court's balancing of the probative value and the prejudicial effects of admitting co-conspirators' guilty pleas and held that the reasons for admitting them were "inadequate to support the risk of jury prejudice under the facts of this case."[5] Id. at 1205.

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[4] Fed. R. Civ. P. 403 provides:
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[5] In one case, the evidence of guilt was so strong that admission of a co-conspirator's guilty plea was allowed to stand under a plain error standard even without limiting instructions from the court. *Government of the Virgin Islands v. Mujahid*, 990 F.2d 111 (3d Cir. 1993).

IV.

On appeal, Gaev contends that the co-conspirators' plea agreements were improperly introduced in evidence and that, as a result, he is entitled to a new trial. In response to defense counsel's request to the trial judge to bar evidence of the plea agreements, the government set forth proper purposes for their introduction - that the jury would wonder why Gaev had been singled out for prosecution and whether the witnesses had been given a "sweetheart" deal in return for their cooperation. The government argued that the jury could not properly assess the credibility of the witnesses without knowledge of the plea agreements.

Over the defense counsel's objections, the district court admitted the plea agreements, and sought to prevent any misunderstanding or misuse of the pleas on the part of the jury by giving detailed instructions. Although Gaev proposed alternative jury instructions which the court did not accept, he maintains that no instructions could have cured the defect of admitting the plea agreements in evidence.

Gaev contends that because he offered not to attack the witnesses' credibility on the basis of their plea agreements, as defense counsel had done in *Inadi* or *Gambino* (although he did not forswear attacks on other bases), the plea agreements should not have been admitted. Gaev also argues that our recent opinion in *United States v. Thomas*, decided shortly after his conviction, supports his position. But there are specific

issues of credibility here not present in *Thomas*.[6] Gaev's attorney challenged critical aspects of Gaev's participation in the activities that formed the basis for the price-fixing charge - discussion and agreement on future prices, and in doing so, he challenged the witnesses' credibility. The credibility of Bergwall, Stickles and McEntee was relevant to establishing the underlying facts that formed the basis of Gaev's conviction. Gaev's attorney denied Gaev had agreed to fix prices with his competitors and, in cross-examining Bergwall, suggested that Bergwall's testimony had been influenced by government coaching. The district Court admitted the co-conspirators' guilty pleas for proper purposes: to assist the jury in assessing the credibility of the witnesses and to make clear that Gaev was not being singled out for prosecution.

We have long recognized the hazards of admitting evidence of a co-conspirator's guilty plea to a conspiracy charge. *Thomas*, 998 F.2d at 1206: *Gambino*, 926 F.2d at 1367; *Biscaccia*, 623 F.2d at 312-13; *United States v. Toner*, 173 F.2d 140, 142 (3rd Cir. 1949). Conspiracy by definition requires the participation of more than one party, and the jury may take a guilty plea by a co-

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[6] In *Thomas*, we held "there was no direct evidence of Thomas's criminal intent and most of the circumstantial evidence of his intent was credibly contested by Thomas." *Thomas*, 998 F.2d at 1207. By contrast, Gaev's co-conspirators gave direct evidence of his participation in discussions to set future prices. In addition, in *Thomas* we said, "We are not left with the requisite 'sure conviction that the error did not prejudice the defendant' and do not conclude that the admission of . . . [the] guilty pleas was harmless error." *Id.* (citation omitted). In this case, we find neither error not prejudice.

conspirator as evidence of the defendant's guilt, an impermissible inference. Yet the testimony of a co-conspirator often cannot be properly evaluated without knowledge of the plea agreement. The trial court must weigh the probative value and the prejudicial effects of the plea agreement before deciding whether to admit it with limiting instructions.[7]

In this case, defense counsel called the balancing test to the attention of the district court and the court decided to admit the evidence with proper limiting instructions. The pleas were introduced for proper purposes. The decision whether to admit or exclude evidence is committed to the sound discretion of the district court. *In re Merrit Logan, Inc.* 901 F.2d 349, 359 (3rd Cir. 1990); *Pinney*, 967 F.2d at 914; *Leo*, 941 F.2d at 188. We find no abuse of discretion here.[8]

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[7] For a description of suggested proper procedure, see *United States v. Werme*, 939 F.2d at 114, n.4.

[8] In addition, Gaev raised the following points of error:
(1) That the admission of testimony of a dissimilar and unrelated price fixing conspiracy that did not involve the defendant created unfair prejudice;
(2) That the defendant's Sixth Amendment rights were violated because the court improperly admitted hearsay statements of the unindicted co-conspiracy, Milikowsky;
(3) That the prosecution's summation improperly commented on the defendant's failure to take the stand;
(4) The court's failure to grant the defendant's motion for a bill or particulars, and the lack of information as to the identity of the victims and the alleged events of the conspiracy severely prejudiced the defense; and
(5) That the court erred in enhancing the sentencing guideline level for the defendant.

CONCLUSION

For reasons stated, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States

Court of Appeals for the

Third Circuit

After care consideration of these claims, we conclude they have no merit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1643

UNITED STATES OF AMERICA

VS.

LOUIS J. GAEV

Appellant.

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Criminal No. 92-00457)

Present: Sloviter, Chief Judge, Sciria and Lewis, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third

Circuit LAR 34.1(a) on January 19, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 2, 1993, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

P. Douglas Sisk, Clerk

Dated: April 29, 1994

Certified as a true copy and issued in lieu of a formal mandate on June 3, 1994.

Teste: /s/ Bradford A. Baldus
Chief Deputy clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1643

UNITED STATES OF AMERICA

v.

LOUIS J. GAEV,
Appellant

(D.C. Crim. No. 92-00457)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH and LEWIS, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/Anthony J. Scirica
Circuit Judge

Dated: MAY 26, 1994

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

vs.

LOUIS J. GAEV

JUDGMENT OF CONVICTION
(For Offenses Committed on or After
November 1, 1987)
Case No. 2:92CR00457-1

Defendant's Attorney: Carl D. Poplar, Esq.

The Defendant was found guilty on Count 1:

Title 15 USC §1
Nature of Offense: Sherman Act
Date Offense: 3/1/90
Count Number: 1

The defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SS#: 184-22-8601
Defendant's Date of Birth: 12/19/29

Date of Imposition of Judgment: 6/30/93

(s) J. Curtis Joyner
J. CURTIS JOYNER
JUDGE USDC EDPA

Dated: June 30, 1993

Defendant's Residence:

110 Bentwood Drive
Cherry Hill, N.J. 08034

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 15 months.

(x) The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the individual be housed in a local facility. It is also recommended that the individual be housed in a level one (1) security facility.

( ) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States marshal for this district.

(x) The defendant shall surrender for service of institution designated by the Bureau of Prisons before 2:00 p.m. on 7/30/93.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court. If this judgment imposes a fine or a restitution obligation, it

shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the financial obligation portion of this Judgment. The defendant shall comply with the following additional conditions:

Individual will serve three(3) months in home detention upon completion of his sentence of 15 months incarceration. Defendant shall pay for the cost of the monitoring equipment. It is ordered that this matter be transferred to the jurisdiction of the District of New Jersey - Probation Department.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any

narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINANCIAL OBLIGATIONS

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below:

Count 1
Assessment: $50.00
Fine: $50,000.00
Restitution: -0-

FINE

The fine includes any costs of incarceration and/or supervision.

( ) The court has determined that the defendant does not have the ability to pay interest in full.

It is ordered that:

( ) The interest requirement is waived.

( ) The interest requirement is modified as follows:

RESTITUTION

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column below. Restitution shall be paid to the following persons in the following amounts:

Name of Payee -0-
Am't of Restitution -0-
Priority Order of Payment -0-

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) fine costs; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be paid as follows:

( ) in full immediately.

( ) in full not later than _____.
( ) in installments which the probation officer shall establish and may periodically modify provided that the entire financial penalty is paid no later than 5 years after release from incarceration, if incarceration is imposed. If probation is imposed, not later than the expiration of probation.
(x) in monthly installments of $1,020.41 over a period of 49 months. The probation officer may periodically modify the payment schedule, provided the penalty is paid in full in accordance with the term specified above. The first payment is due 30 days after the date of this judgment. The second and subsequent payments are due monthly thereafter.

All financial penalty payments are to be made to U.S. Clerk of Court Eastern District of Pennsylvania except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall pay interest on any fine of more than $2,500 unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C.§3612(f). all of the above payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

Unless otherwise ordered by the court, any financial penalty imposed by this order shall be due and payable during the period of incarceration, with any unpaid balance to be a condition of supervised release. Any financial penalties collected while the defendant is incarcerated shall be reported by the Bureau of Prisons to the Clerk of the Court and the probation officer. The probation officer shall notify the United Stated District Court, the Clerk of the Court, and the U.S. Attorney's Office of the payment schedule and any modifications to that schedule.

STATEMENTS OF REASONS

(x) The Court adopts the factual findings and guideline application in the presentence report.

OR

( ) The Court adopts the factual findings and guideline application in the presentence report except

Guideline Range Determined by the Court:

Total Offense Level: 14

Criminal history Category: I

Imprisonment Range: 15 to 21 months

Supervised Release Range: 2 to 3 years

Fine Range: $600,000.00 to $1,500,000.00

(x) Fine waived or imposed below the guideline range, because of inability to pay

( ) Fine restitution is not ordered or the following reasons:

(x) The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

( ) The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

( ) The sentence departs from the guideline range

( ) upon motion of the government, as a result of defendant's substantial assistance

( ) for the following reasons:

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Crim. No. 92-457
	)	Violation: Title 15,
v.	)	U.S.C. §1
	)	
LOUIS J. GAEV,	)	
	)	
Defendant.	)	INDICTMENT
	)	

The GRAND JURY charges:

I.
DESCRIPTION OF THE OFFENSE

1. LOUIS J. GAEV is indicted and made a defendant on the charge stated below.

2. Beginning sometime prior to April 1, 1986 and continuing at least through March 1990, the exact dates being unknown to the grand jury, the defendant and co-conspirators entered into and engaged in a combination and conspiracy to fix prices of new steel drums offered for sale to customers in the states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, eastern New York, eastern Pennsylvania, New Jersey, Maryland, Delaware, Virginia and the District of

Columbia (referred to in the indictment as the "Eastern Region"). The combination and conspiracy unreasonably restrained interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

3. The charged combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendant and co-conspirators, the substantial term of which was to agree to fix prices of new steel drums in the Eastern Region.

4. For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and co-conspirators did the following things, among others:

(a) discussed and agreed to increase prices or decrease discounts on new steel drums to individual customers;

(b) discussed and agreed on the timing of price changes and the terms to be offered to individual customers;

(c) participated in meetings and telephone conversations with one another to determine prices and terms of sales to individual customers;

(d) issued price quotations to customers in accordance with agreements reached;

(e) monitored and enforced adherence to agreed-upon prices and terms by discussing, in meetings or in the course of other contacts, any deviations from agreements concerning individual customers; and

(f) sought to conceal their conspiratorial

contacts with one another through various means, including through the use of aliases.

II.
DEFENDANT AND CO-CONSPIRATORS

5. During all or part of the period covered by this Indictment, LOUIS J. GAEV was Director of National Sales for Russell-Stanley Corporation, a steel drum manufacturer organized and existing under the laws of the State of New Jersey with its principal place of business in Red Bank, New Jersey. During all or part of the period covered by this Indictment, Russell-Stanley Corporation produced new steel drums at a plan in Woodbridge, New Jersey and at other locations, and sold them in the Eastern Region. LOUIS J. GAEV was responsible for sales in that region.

6. Various persons and firms, not made defendants in this Indictment, participated as co-conspirators in the charged combination and conspiracy and performed acts and made statements in furtherance of it.

III.
TRADE AND COMMERCE

7. New steel drums are large steel packaging containers which are used most frequently for packaging chemical and petroleum products. There are two basic types of steel drums, tight or closed head drums and open or removable head drums. New steel drums range in size from about 13 gallons to 57 gallons and in gauge

(thickness) of steel of 16 gauge to 26 gauge. They are produced from different types of steel (low carbon, stainless or galvanized) and can contain fittings to provide for filling and dispensing the contents of the drums. They can be lined or unlined and also painted or decorated in various ways. The most common steel drum is a 55 gallon, tight head, low carbon steel drum with a 20-gauge steel body and an 18-gauge steel top and bottom. new steel drums are distinguished from reconditioned steel drums, which are used steel drums that have been cleaned and restored for resale.

8. During the period covered by this Indictment, the defendant and co-conspirators sold and shipped new steel drums in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which the defendant and co-conspirators produced the new steel drums.

9. The business activities of the defendant and co-conspirators that are the subject of this Indictment were within the flow of, and substantially affected, interstate trade and commerce.

IV.
JURISDICTION AND VENUE

10. The combination and conspiracy charged in this Indictment was carried out, in part, within the Eastern District of Pennsylvania within the five years preceding the return of this Indictment.

In violation of Title 15, United States Code, Section 1.

A TRUE BILL

DATED: 8-12-92

_____
FOREPERSON

/s/Charles A. James
CHARLES A. JAMES
Acting Assistant
Attorney General

/s/Dwight Dickinson
DWIGHT DICKINSON

/s/Katherine A. Schlech
KATHERINE A. SCHLECH

/s/Joseph H. Widmar
JOSEPH H. WIDMAR

/s/Richard E. Byrne (by KAS)
RICHARD E. BYRNE

/s/Anthony V. Nanni
ANTHONY V. NANNI

/s/Peter J. Levitas
PETER J. LEVITAS

Attorneys, Antitrust
Division, U.S. Department
of Justice

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(202) 307-6694

/s/Michael M. Baylson First Assistant U.S. Attorney
MICHAEL M. BAYLSON
United States Attorney
Eastern District of Pennsylvania

APPENDIX F

15 U.S.C. § 1

§1. Trust, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition

with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.